2003

Clifton W. Panos v. Third Judicial Court of Tooele County and The Hon. Randall N. Skanchy, and Jennifer Ann Castle : Reply Brief of Petitioner on Hearing

Utah Supreme Court

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Clifton W. Panos; Pro Se; Petitioner and Plaintiff.

COPY

IN THE SUPREME COURT OF THE STATE OF UTAH

Clifton W. PANOS,

Petitioner/Plaintiff,

vs.

THIRD JUDICIAL DISTRICT COURT of Tooele County,

and

The Hon. Randall N. SKANCHY,

Respondents,

and Jennifer Ann CASTLE,

Real Party in Interest/ Defendant.

Case No. 20030344-SC

lodged (2)

REPLY BRIEF OF PETITIONER ON REHEARING

ON GRANT OF REHEARING ON PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS DIRECTING THAT RESPONDENT DISTRICT COURT AND JUDGE LACK JURISDICTION TO HEAR THIS SMALL CLAIMS ACTION ON APPEAL IN TRIAL DE NOVO, AND FURTHER REQUIRING THAT APPEALED CAUSE BE DISMISSED

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Detail of the Argument in Reply

REPLY ARGUMENT I.

Adverse Counsel Asserts Heresy (or Maybe I Mean "Hearsay")

Over and over and over again, like a whipporill's call, the Real Party in Interest iterates the same refrain: To wit, *some unidentified clerk of the Tooele Justice Court erroneously stated that the requisite filing fee was only $70 for appeal of a small claims action to district court for trial de novo.* To quote verbatim:

> "SUMMARY OF ARGUMENTS Defendant Jennifer Castle timely paid the filing fee *represented to her by the clerk of the Tooele Court*.... Clerks are assigned the responsibilities to collect fees and do in fact represent the amounts of fees to the public. *Ms. Castle relied on this amount*...." (Opposing brief of Defendant/Real Party in Interest at p. 10.)

> "ARGUMENT I. Ms. Castle Timely Paid a Portion of the Filing Fee in this Matter *in Reliance on Statements of Court Personnel*.... Plaintiff's primary argument in his motion to dismiss the underlying appeal from the small claims court and this writ is that Defendant failed to properly pay the filing fees in this matter and this case should be dismissed for lack of jurisdiction. The undisputed facts indicate that *this mistake was caused by a combination of clerical error* and inadvertence." *Id.* at p. 12.

Plaintiff's argument ignores the realities of what occurred in this case and often occurs, *namely clerks give this information out* [pertaining

to filing fees] *all the time and it is universally relied upon*....This Court noted in Dipoma that a party *should be able to rely on the statement of Court clerks*." *Id.* at p. 17.

"As is customary [Customary? So why wasn't a discrepancy in the amount due noticed on this occasion?], the undersigned's office called the justice court and stated that an appeal was going to be filed and requested the amount of the fee. The response was given that the amount due was $70.00....[A]nd therefore the error was apparently missed by the Justice Court clerks. This error seems to be a combination of the mistake by the undersigned's office in failing to send the $10.00, *and the clerk's office not requesting the payment* of the $10.00...." *Id.* at p. 13.

"9. [Statement of Facts] Defendant, *relying on the aforementioned facts, failed to pay this additional $10.00 filing fee* to the Justice Court until February 26, 2003." *Id.* at p. 8.

"Defendant's counsel simply failed to pay the full filing fee with the notice of appeal *due to* and [sic] *reliance upon the conversation between the secretary and the clerk of the court*....In the present matter, Defendant would lose her opportunity to defend herself and be heard for a mistake in failing to pay an additional $10.00 fee, *which was an error made by both counsel and the clerks of the court*." *Id.* at p. 18.

"The incorrect amount was paid due the above-referenced error.... Counsel's secretary *called the clerk to verify the amount due and reasonably relied and in fact acted on that statement*." *Id.* at p. 15.

"As recited above, Defendant timely filed her notice and paid the fee *requested by the court clerk*." *Id.* at p. 19. "Accordingly, Plaintiff [sic]

reasonable [sic] *relied on the statements of the court clerks*...." *Id.* at p. 20.

"[B]oth this Court and the Court of Appeals have held...that a party must be allowed *to reasonably rely on the representation of court clerks*. The facts...stand for the proposition that the court (in that case, the Court of Appeals) has the ability to retain jurisdiction over the matter if the error of timely filing *was due to a clerical error*." *Id.* at p. 20.

"[T]he error was due to reliance on statements from the clerks of the court and the trial court properly allowed the appeal." *Id.* at p. 25.

"Her [Real Party in Interest's] only redress on appeal would have been *her reliance on the court clerks*..." *Id.* at p. 24.

(In the above, except for rubrics and case name, italics and underlining were added.)

The Pressing Question Before the Court Is: Shall Hearsay Decide This Case?

Now Utah Rule of Evidence 801(a) denotes such a claimed oral assertion by the purported anonymous clerk as a "statement". And the alleged clerk himself is defined in subpart (b) to be a "declarant". Thereafter the Rule goes on to gloss "hearsay" as: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (See Addendum, Exhibit "C", for copy of Rule.) In other words, what evidence is adduced to prove that any clerk ever made such a statement to the secretary of the counsel to the Real Party in Interest? Is an

affidavit of the purported clerk himself (or herself) ever presented? No, the evidence of the truthfulness of the asserted matter rests solely upon the *ipse dixit* (that's Latin for "she herself says so") of the secretary on her own behalf. (Refer to her affidavit at pp. 79, 80, 322 & 323 of record; see Addendum, Exhibit "D")

The Hell of It All Re Hearsay and the Utah Rules of Small Claims Procedure

O.k., *so let's posit that what we have here is hearsay of a most crimson hue*. Was an objection to that effect ever lodged with the trial court? No, uh-uh.

Why not? Well, to understand that, you have to appreciate (or at least take account of) the Utah Rules of Small Claims Procedure. Rule 7(d) provides, "The judge may allow hearsay that is probative, trustworthy and credible."

O.k., so that just moves everything one step down the line, and now the question becomes, "Was Janet Layosa's affidavit, albeit hearsay, ever objected to as not being probative, trustworthy, or credible?" No, uh-uh.

Why not? Well, back to the Utah Rules of Small Claims Procedure again---7(d) further stipulates, "The rules of evidence shall not be applied strictly." Now get the fine distinction there: The Rule doesn't say "need not". The Rule says "shall not". (Jesus, Joseph and Mary, my most fervent desideration would be to stride into a convening of whatever

advisory committee formulated those idiotic rules with a freshly honed pitchfork, having first padlocked all the exits. Those people are an affront to sound intelligence.)

If the rules of evidence are strictly applied, you can stack up case law higher than the throne of God to demonstrate conclusively that, even as hearsay, Janet Layosa's affidavit should be disallowed on the ground that it is not probative, trustworthy, or credible. Witness:

> There is a two-pronged test for determining the admissibility of hearsay: first, there must be a showing of unavailability and, second, the testimony must bear sufficient indicia of reliability. *State v. Menzies,* 889 P.2d 393 (Utah 1994).

> Hearsay is generally not admissible on the ground that it lacks trustworthiness for two basic reasons: (1) the person who purports to know the facts is not stating them under oath; (2) that person is not present for cross-examination.
> *State v. Sibert,* 310 P.2d 388 (Utah 1957).

But Christ in a whorehouse, if you promulgate a rule of procedure which says, "The rules of evidence **shall not** be applied strictly. The judge may allow hearsay that is probative, trustworthy and credible.", you've just given the judge a license to print money so far as whatever he chooses to deem "probative, trustworthy, and credible." With respect to the meaning of those terms, if you can't argue with full and complete reliance upon the Utah Rules of Evidence and the case law attendant to them, then it's

anybody's guess and the judge can admit anything he wants, and it's impossible to construct a pleading to confute him on the point.

The Hell of It All Re Discovery and the Utah Rules of Small Claims Procedure

O.k., let's review: We've got a case before the Utah Supreme Court which apparently is going to be decided based upon the unsupported (apart from her own self-assertion) seeming hearsay of a lawyer's secretary who says she correctly rang a certain telephone no. (purportedly that of the Tooele County Justice Court and not the Psychic Hotline), that someone answered claiming to be a clerk (she can't specifically say who), and we have her word for it that they distinctly told her the filing fee was $70, and she didn't misunderstand them in any way. Oh yeah, and the someone who allegedly told her that is unavailable for cross-examination because she doesn't know their name. And the judge's admission of that dubious profession cannot be effectively challenged because the pertinent procedural directive is that "The rules of evidence shall not be applied strictly." Jesus wept!

But maybe things aren't quite so dismal as they seem. I mean, so what if we don't know precisely which clerk to call and cross-examine? After all, how many can there be? Three or four at the most? Why not simply subpoena and depose them all?

Well, those advisory committee dolts who formulated the Utah Rules of Small Claims Procedure happened to thwart even that. Rule 6(a)

enjoins, "No formal discovery may be conducted...". The question of deposing all the justice court clerks was discussed with Judge Skanchy in open court and he indicated he was not inclined to allow it.

The Hell of It All Re Motions and the Utah Rules of Small Claims Procedure

It is impossible to properly assess the meaning of any answer to a question apart from distinctly knowing what was posed. For example, the response "I hate blacks" would denote something entirely different coming after the query "Is there any misconception about yourself which people have?" than it otherwise might.

Anyway, THE CRUX of the Real Party in Interest's case is that her lawyer's secretary WAS MISINFORMED about the proper filing fee due. To cite the secretary's affidavit: "I specifically asked the Justice Court Clerk what the appropriate filing fee was for an appeal from a Justice Court small Claims decision...I was informed that the filing fee would be $70.00...I was not told by the Justice Court Clerk of any additional fees to this $70.00."

However, *even when deprived of the ability to challenge this affidavit via strict application of the Rules of Evidence* (as complained about above), I think it could still be held that the secretary's testimony wasn't probative ABSENT A YET MORE DEFINITE RECOUNTING OF THE ALLEGED ACTUAL QUESTION POSED AND THE EXACT RESPONSE PURPORTEDLY PROVIDED BY THE CLERK. Otherwise it might still be that the ostensible answer of $70.00 is entirely correct without any misstatement on the part

of the clerk.

Very well, so was this objection ever raised and the issue laid at the feet of the trial court? No, uh-uh.

Why not? Well, back to the f****** Utah Rules of Small Claims Procedure again. Rule 6(b) provides, "Written motions and responses may be filed prior to trial. Motions may be made orally or in writing at the beginning of the trial. *No motions will be heard prior to trial.*"

NOW HOW IN THE HOLY NAME OF F*** could a judge rule on a written motion made at the beginning of trial that he hadn't had a chance to read, nor the adverse party an opportunity to respond to? God bugger me.

Anyway, procedurally here's what happened: I filed a Motion to Dismiss Appeal [for court's lack of jurisdiction] on February 24th, 2003 (found at pp. 48-63 of record). Thereafter, on February 28th, 2003, a Memorandum in Opposition to Plaintiff's Motion to Dismiss Appeal (found at pp. 77-88 of record) was filed by the adverse party . IT WAS IN CONNECTION WITH THIS FILING that counsel for the adverse party first raised the insistence that the counsel's secretary was misinformed as to the filing fee, and I intended to challenge this contention. ON THIS SAME DATE a notice (found in record at pp. 75-76; see Addendum, Exhibit

"F") was sent informing the parties that the judge proposed, contrary to the procedural rules, to decide this motion at a pretrial conference on March 17th. On March 11th, realizing that I couldn't adequately be prepared by the date of the pretrial conference to reply to the adverse party's Memorandum in Opposition, I moved the court for a continuance, which was denied. So on Saturday, March 15th, I sent a fax to the judge (filed March 17th; found at pp. 117-123 and 124-130 of record; see Addendum, Exhibit "G") saying (in essence), "All right, ya bastard, I would be prepared to stipulate to this motion being dealt with at a pretrial hearing, because after all, when else are you logically going to address a motion to dismiss for lack of jurisdiction? At trial like the insane court rules require? But if you're going play hardball with me, it's quid pro quo, and I'm putting you on notice that I've never agreed to waive any of the relevant rules, and you're out of order to proceed as you are." Thus I preserved the issue.

I assert the foregoing with much emphasis, because counsel for the Real Party in Interest has charged at p. 15 of his opposing brief:

> "Counsel's secretary called the clerk to verify the amount due and reasonably relied and in fact acted on that statement. Plaintiff challenges this fact, however, he has not properly disputed it here or in the court below....First, no counter affidavit was filed in the trial court."

And at p. 16 thereof, "In the trial court he only asserted that the

undersigned's secretary is a liar."

But the countervailing facts are these:

1.) I could not challenge Janet Layosa's affidavit on the ground that it is hearsay, because hearsay is admissible in a small claims action.

2.) Apart from a strict application of the Utah Rules of Evidence, something not allowed under the procedural rules, it was virtually impossible to attack it as hearsay which is not "probative, trustworthy, or credible".

3.) And although I might have been able to defeat it by showing at the time of trial that it wasn't "probative"---- because neither Janet Layosa's alleged query to the clerk nor the clerk's purported answer were ever adequately delineated in the affidavit---- I wasn't able to do even that because the procedural rules weren't followed regarding the disposition of motions in a small claims action. A further motion for reconsideration was presented at trial, but under the strictures consequent to such a pleading, only the issues of the original motion as heard and denied by the court could be revisited.

IT IS NOTEWORTHY that both Petitioner and Real Party in Interest reach concordance on this: If not that I preserved the issue, then at least that this "responsive letter" (as her counsel terms it) was in lieu of any other counter contention. As the brief of the Real Party in Interest concurs at p. 9 under "Statement of Facts":

"11. Plaintiff did not file a reply memorandum, but filed a responsive letter [March 15 fax to judge] with various attachments. **See Record 96-130** [bolder typeface added]

"12. Plaintiff filed no counter affidavits alleging that the clerks made no such statements to defense counsel's secretary."

Now there's an old Chinese proverb (really): The antidote for poison is yet more poison (sort of their way of saying "fight fire with fire"). And what adverse counsel suggests is that I should have matched a Roland for an Oliver and refuted Janet Layosa's hearsay affidavit with a hearsay affidavit of my own, asserting that the justice court clerks had related to me the very opposite of what she was claiming.

REPLY ARGUMENT II.

Innocence Is No Excuse (or Is That "Ignorance" Rather?)

What constitutes (in the sense of a proscription against giving it) "legal advice"? Well, there seems to be a paucity of Utah jurisprudence defining it, but there's no lack of federal case law. Well, to start with, ANY statement intended to apprise or admonish another in respect of the law——such as "That's illegal; report it to the police" or "You ought to sue the bums"——qualifies as legal advice. But some legal advice rises to the level of "the unauthorized practice of law", and some does not. *Disciplinary Counsel v. Palmer*, 761 N.E.2d 716 (Ohio 2001). HEREAFTER only illustrations embracing "legal advice" which can

subject someone to that liability will be cited.

DEFINITIONALLY HOWEVER, all authorities agree that for a jural propoundment to be deemed "legal advice" it must possess TWO QUALITIES. NO. 1, it has to be directed toward expounding rights and obligations. FOR EXAMPLE, let's suppose I bump into Justice Durrant one day and I pose to him, "What's the difference between murder and manslaughter? I've never understood that distinction." For the next six hours he can laboriously explicate the contrast in minute detail, and such a discourse couldn't get him in any hot water. HOWEVER, If I were to ask, "Could I be prosecuted if I did this?", that's completely dissimilar, because in that instance he'd be delineating rights and responsibilities to me. (And please take heed that the question of any filing fee that it is incumbent upon a person to pay certainly denotes a "legal responsibility".)

NO. 2, in order to be considered "legal advice" a jural propoundment has to be interpretive of the law. FOR EXAMPLE, if Justice Durrant were to say to me, "Whenever you operate a motor vehicle, the law says you must do so safely", that is NOT a statement that could be deemed "legal advice" even though it clearly states a legal obligation on my part. NOR would "If someone libels you, you can sue them" qualify, even though a legal right is thereby presented. HOW COME? Because neither of these statements is genuinely interpretive of the law. However, if Justice Durrant were to say, "When you pull across the centerline to pass

someone, you may exceed the posted speed limit in order to do so as quickly as possible", that involves both statement of a right and an interpretation of law, and therefore fits the definition of "legal advice". And when a clerk declares to someone, "The requisite filing fee is $70", that too is an interpretation of the law.

BEAR IN MIND that it is not the complexity or simplicity of an utterance which determines whether or not it is interpretive of the law—— rather it is the nature of the statement. For example, in the case of *In re Herren*, 138 B.R. 989 at 995 (Bkrtcy.D.Wyo. 1992) **(see Addendum, Exhibit "H") , it was actually maintained, "Further, the court finds and concludes that the [alleged unauthorized practitioner's] exhortation to 'please don't delay...your debt problem will *not* go away..unless you act NOW', is itself giving legal advice." (Mother of God! You gotta be kiddin' me!)**

ANOTHER CONSIDERATION serving to determine if giving "legal advice" subjects someone to liability for "the unauthorized practice of law" is whether it is directed to a specific individual or not. FOR EXAMPLE, let's suppose Associate Chief Justice Durrant is featured as a speaker at a convention of the American Bar Association. And there he addresses the throng and says, "I'm convinced that military conscription is an abrogation of the constitutional guarantee against involuntary servitude, and that no citizen is obliged to comply with a draft notice." If

I ran down to the Judicial Conduct Commission with a copy of his remarks and protested, "Look at this; old man Durrant is going so far as to dispense legal advice to every man jack in America", they'd laugh me to scorn and respond, "Well, if it ever gets to the point where he's directing himself to some distinct person, let us know. But until then...." HOWEVER, if I were to call him up on the telephone and say, "Guess what, Matt, I've been ordered to report for induction", and he replied, "You [and I emphasize YOU meaning Clif Panos] are not bound to do so if I know anything about the law", he could sure get sanctioned for that as a sitting jurist. Because then he'd be furnishing instruction to an identifiable individual as to their legal rights and responsibilities.

LIKEWISE, if a court or judicial authority disseminates legal information TO THE COMMUNITY AT LARGE, that's o.k.. For example, if you go to the Utah State Courts' web site (www.utcourts.gov), they've got tons and tons of this "be your own lawyer" crap on there, like:

Pro Se Guide to Appeals Procedures
***(http://www.utcourts.gov/courts/appell/prose.htm)*,**

Pro Se Guide to Filing Petition for Writ of Certiorari
(http://www.utcourts.gov/resources/forms/certi/prose.htm), and

Glossary of Legal Terms
(http://www.utcourts.gov/resources/glossary.htm).

In fact, to relate the purpose of all this in their own words, "In an effort to educate and inform court users, Utah's State Courts have created a web based resource to address frequently asked questions as well as *provide step-by-step instructions on how to complete common court procedures.*"

(Italics and underlining added).

Now for the sake of further elucidation, let's consider the last of those self-help resources listed above, the *Glossary of Legal Terms.* Sweet jumpin' Jesus, **DO YOU REALIZE** that in the case of *In re Kaitangian*, 218 B.R. 102 at 111 (Bkrtcy.S.D.Cal. 1998) (see Addendum, Exhibit "I"), the federal courts have held, **"In connection with preparing legal documents,...providing clients with explanations or definitions of such legal terms of art as 'reaffirmation' is, by itself, the giving of 'legal advice [which may subject non-attorney to liability for the 'unauthorized practice of law']."** And there *Kaitangian* gave as precedent *In re Herren* (previously cited above), in which it was held at 994-995, **"In connection with preparing legal documents, such as the [bankruptcy] schedules, providing clients with definitions of such legal terms of art as 'creditors holding secured claims,' 'real property,' 'executory contracts,' and the like is, by itself, giving legal advice."** And at 995, **"[D]efining terms in the schedules...require[s] exercise of legal judgment beyond the capacity and knowledge of lay persons."**

AND IF YOU THINK THAT'S NITPICKING, GET A LOAD OF THIS: In the case of *In re Landry*, 268 B.R. 301 at 304 (Bkrtcy.M.D.Fla. 2001) (see Addendum, Exhibit "J"), it was actually maintained, **"The very act of directing [someone] to review a particular section of a legal book, in and of itself, constitutes 'legal advice,' [which**

non-attorney is prohibited from purveying]." **HOWEVER, that must be qualified by pointing out that it was noted in** *Kaitangian* at 109, "In deciding whether an eviction service was engaged in the unauthorized practice of law, the appellate court in People v. Landlords Professional Services, 215 Cal. App. 3d 1599, 1608, 264 Cal. Rptr. 548 (4th Dist. 1989) found:...'merely giving a client a manual, even a detailed one containing specific advice, for the preparation of an unlawful detainer action and the legal incidence of an eviction would not be the practice of law if the service did not *personally advise* the client with regard to a specific case.'" **(italics and underlining added). And this aspect of** *Landlords' Professional Services,* **regarding which** *Kaitangian* **remarked at 113 that the** "[C]ourt found personal contact was a key factor in finding defendant was engaged in the unauthorized practice of law" **(underlining added), was commented upon again in n. 13 thereto:** "The court in Landlords' Professional Services reviewed similar cases in other jurisdictions. For example, in Oregon State Bar v. Gilchrist, 272 Ore. 552, 538 P. 2d 913 (1975) the court concluded that it was not an unauthorized practice of law to advertise and sell divorce kits so long as the service had no personal contact with a client. In New York Lawyers' Assn. v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967), the court found sale of Norman F. Dacey's book 'How to Avoid Probate' was not an unauthorized practice of law since there was no personal

contact or relationship with any particular individual...." (underlining added). AND HENCE I emphasize that the alleged questioning of some court clerk on the telephone by the adverse counsel's secretary, as opposed to *pro se* legal guides being furnished impersonally on the Utah State Courts' web site, weighs heavily in the assertion that the clerk improperly gave legal advice to the secretary.

BY ALL THAT MEN CALL HOLY, DO YOU MEAN TO TELL ME that if I were to ring up Pat Bartholomew or Matty Branch and inquire, "So what does the term 'collateral estoppel' denote?", they couldn't (under U.S. law at least) give me their version of whatever they think it means, BECAUSE that would be rendering "LEGAL ADVICE"? Or, if I were to call and ask, "Where the hell does it say I have to file 10 copies of my brief?", for the same reason Pat couldn't just fax me a copy of Utah Appellate Procedure Rule 26 with subpart (b) circled? TECHNI-CALLY, NO!

How then can that precise information be disseminated on the Utah State Courts' web site? Or how can they propagate on there a Glossary of Legal Terms? BECAUSE IN THAT INSTANCE THE JUDICATURE IS DIRECTING INFORMATION TO THE PUBLIC AS A WHOLE, AND NOT RESPONDING TO A SPECIFIC LITIGANT'S INQUIRY. This rationale upholding the Utah State Courts' web site is predicated upon "*New York County Lawyers' Association v. Dacey* [see Addendum, Exhibit "M"), 28

A.D.2d 161, 283 N.Y.S.2d 984, reversed and dissenting opinion adopted 21 N.Y.2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459 (N.Y. 1967), which held that the publication of forms and instructions on their use does not constitute the unauthorized practice of law if these instructions are addressed to the public in general rather than to a specific individual legal problem....Other states have adopted the principle of law set forth in *Dacey*, holding that the sale of legal forms with instructions for their use does not constitute unauthorized practice of law. See *State Bar of Michigan v. Cramer*, 399 Mich. 116, 249 N.W.2d 1 (1976); *Oregon State Bar v. Gilchrist*, 272 Or. 552, 538 P.2d 913 (1975). However, these courts have prohibited all personal contact between the service providing such forms and the customer...." **Citing (underlining added)** *Florida Bar v. Brumbaugh*, 355 So.2d. 1186 at 1191 (Fla. 1978) **(see Addendum, Exhibit "K").** **Nevertheless contrarily,** "The Supreme Court of Florida has taken a different view and has held that the giving of specialized advice to a general audience rather than to a particular individual constitutes the practice of law. See *The Florida Bar v. American Legal & Business Forms, Inc.*, 274 So.2d 225 (Fla.1973) and *The Florida Bar v. Stupica*, 300 So.2d 683 (Fla.1974)." **Citing (underlining added)** *Gilchrist* **(see Addendum, Exhibit "L")** at 918.

Does that mean, as the attempted *reductio ad absurdum* on p. 16 of adverse counsel's brief suggests, that if I sashay up to the front counter

and try to file a nonconforming brief, Pat Bartholomew can't say, "PURSUANT TO R.App.P. 27(e), your brief is rejected for filing", because such a statutory reference constitutes a provision of "legal advice"? NO, that's o.k., because in that instance Pat Bartholomew would not be advising me as to a right, duty, responsibility, or obligation which I have, but a right, duty, responsibility, or obligation which SHE has. Also, she would be making a public pronouncement on behalf of the Court. Even if we were the only two people in the office at the time, it doesn't matter. It would still be a public pronouncement made on behalf of the Court. However, if she were later to mail me a copy of Rule 27(e) with a note on it saying, "You need to read this", that would be an improper private communication between her and me AND a prohibited affordment of legal advice.

LIKEWISE, if the lawyers' secretary Janet Layosa rings up a clerk of the Tooele Justice Court and inquires, with respect to the amount of the filing fee she must submit, what her legal responsibility is, ONLY LICENSED ATTORNEYS ARE ALLOWED TO AUTHORITATIVELY ADVISE INDIVIDUALS WHAT THEIR RIGHTS AND RESPONSIBILITIES ARE. The clerk may accede to voice his opinion on the point, but in doing so he enters into private communication with a litigant and is not speaking publicly on behalf of the Court. Ignorance is no excuse, and the Court does not provide legal apprisement, and if Janet Layosa turns to a clerk for guidance because she doesn't know the statutory provisions, fine.

But she cannot raise an objection of ineffective assistance of counsel if the non-attorney advice she gets from the clerk turns out to be wrong.

REPLY ARGUMENT III.

Exhibits "H" and "I" of Opposing Brief Attempt to Dupe Court

The Real Party in Interest clamors for the Court to take note of the putatively misleading and incomplete information on relevant filing fees provided on the Utah State Courts' web site. At pp. 9-10 of opposing counsel's brief, under the heading "Statement of Facts", these points are alleged:

> "17. Court personnel list the filing fees on the State Court Web Site as well as provide the public, including attorneys, a schedule of filing fees. The fees listed on the website prior to the May 2003 changes stated: 'Trial de novo $70.00' *with no distinction between small claims departments of district courts and small claims decisions of the justice courts*. See Fee Schedule from State Court's Website, attached to Addendum of Defendant and marked as Exhibit 'H'.
>
> "18. The current fee schedule form produced by the State Court System and given to the public, including the undersigned's office states: 'Trial De Novo (*Justice or Small Claims Court*) $75.00' See Fee Schedule produced by State Courts, attached to Addendum to Defendant and marked as Exhibit 'I'."
>
> (italics and double underlining added in both instances above)

GEE, SOUNDS SERIOUS, MAYBE WE BETTER TAKE A LOOK, starting with Exhibit "I". There, up at the top of the page, the fee schedule is

clearly captioned "DISTRICT COURT Effective May 5, 2003". Wow, I wonder if maybe when the fee schedule says, "Trial De Novo (*Justice or Small Claims Court*) $75.00", it means the fee in district court is $75.00, regardless of whether the appeal is from the district court's small claims department or from a justice court? GOSH, MAYBE Exhibit "H" CAN GIVE US A HINT.

The heading of this fee schedule clearly says, "**Utah Code Annotated §78-7-35; Filing Fees**". And if you reference this schedule on the actual website (at http://www.utcourts.gov/resources/Fees.htm), you'll notice there's a link there to the actual statute. Click on that, and here's what you'll read:

78-7-35. Civil fees *of the courts of record* -- Courts complex design.

(1) (a) The fee for filing any civil complaint or petition invoking the jurisdiction of *a court of record* not governed by another subsection is $155.

(b) The fee for filing a complaint or petition is:

(i) $50 if the claim for damages or amount in interpleader exclusive of court costs, interest, and attorney fees is $2,000 or less;

[statute truncated here; italics, underlining, and use of bolder type added]

O.k., so what's going on here at the Utah State Courts' Web site? What it boils down to is there's this whole long laundry list of proceedings

and functions pertaining to district court. And you've got fees listed for various writs and expungements and abstracts and probate stuff and divorce and child custody matters and tort suits and whatnot, and just basically all this sh that a justice court (which is not a court of record) isn't involved with. SO CONSEQUENTLY THE STATUTE DEALING WITH DISTRICT COURT FILINGS FEES IS LONG AND CONVOLUTED AND GOES ON FOR PAGE AFTER PAGE IN THE UTAH CODE ANNOTATED. So what the Utah State Courts' web site has graciously and conveniently done IS TAKE THIS STATUTE AND RENDER IT IN GRAPHIC FORM, i.e., MAKE A PICTURE OUT OF IT for those *pro se* litigants who are reading impaired.**

ALL RIGHT, SO WHY DIDN'T THEY DO THE SAME DAMNED THING with U.C.A. §78-6-14, the statute dealing with justice court filing fees? BECAUSE §78-6-14 is so f**** simple that anybody can understand it, even in just words alone, maybe even a lawyer. It doesn't need to be portrayed in graphic or pictorial form. All it says is:**

> **"78-6-14. Civil filing fees.**
>
> **(1) *Except as provided in this section*, the fees for a small claims action in justice court shall be the same as provided in Section 78-7-35...**
>
> **(4) The fee in the justice court for filing a notice of appeal for trial de novo in a court of record is $10...." [italics added]**

IN OTHER WORDS, when the Utah State Courts put those charts on

their web site, they weren't trying to represent to the public, "Look, these are all the statutes that have anything to do with filing fees." All they were attempting was to take some of the HARD TO FOLLOW ones and make them more comprehensible to all the trailer-park white trash out there wanting to get restraining orders against their deadbeat boyfriends and so on.

REPLY ARGUMENT IV.

Proper Fathoming of *Pari Materia* Refutes Adverse Party's Case Law

At various places in his opposing brief, adverse counsel refers to the "incorporation" of one statute or rule into another. To wit:

> At p. 10, "Rule 12 of the Utah Rules of Small Claims Procedure *did not incorporate* Rule 4-803 of the Utah Rules of Judicial Administration."
>
> At p. 11, "For these same reasons, the District Court did not disregard Rule 4-803 of the Utah Rules of Judicial Administration. This Rule *is not incorporated* into Rule 12 of the rules of Small Claims Procedure."
>
> At p. 14, "The Court noted [in *Dipoma v. McPhie*] that these sections [such as was previously stated, "Utah Code Ann. §21-1-5 (now renumbered as 78-7-35)"] *were not incorporated* into the Rule 3 governing the filing of complaints and that no payment was required to invoke jurisdiction."
>
> At p. 15, "Rule 4-803(2)(D) of the Rules of Judicial Administration requires fees to be paid to invoke jurisdiction. However, as in Dipoma, this Rule *is not incorporated* into Rule 12 of the Rules of Small Claims Procedure."

And finally at p. 20, "Defendant [Castle] would first submit that the District Court did not ignore the requirements of Rule 4-803. As argued above, Rule 4-803 does require the filing of the fee. For the reasons set forth in Part I, Rule 12 does *not incorporate Rule 4-803*. Accordingly, the filing fee was not jurisdictional and the district court properly conducted the de novo trial."

(except for the case name, italics and underlining were added in all instances above)

Since the conclusion propounded by this last statement reveals that opposing counsel presents an argument to this Court predicated in large measure upon the thesis that Small Claims Rule 12 *does not incorporate* C.J.A. Rule 4-803, *there are two questions to be taken up in rebuttal*:

1.) Does the doctrine of *pari materia* not dictate that Small Claims Rule 12 must be construed in conjunction with C.J.A. Rule 4-803?

2.) If such is the case, then why did the Court in *Dipoma* hold that R.Civ.P. 3(a) was not likewise so affected by statutes similarly connected with it?

THE ANSWERS TO BOTH OF THESE QUESTIONS LIE IN A CLEAR UNDERSTANDING OF *PARI MATERIA*. In addressing this doctrine, the prominent authority of Sutherland Statutory Construction has been heavily relied upon. Hereafter excerpts quoted from it are cited by page no. with reference to the sixth edition by Norman J. Singer, 2000 revision, and photocopies of such are in the Addendum. All are extracted from volume 2B, §51.01 "Interpretive relevance of related statutes", §51.02

"Statutes on the same subject construed together", and §51.03 "Statutes deemed to be in pari materia". To wit:

> **"Statutes are considered to be in pari materia [the 4th ed. 1984 additionally has at this point "and thus must be construed together"] when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object."**
>
> **(pp. 201-202; see Addendum, Exhibit "N")**

The Utah Supreme Court, quoting the above excerpt from the 4th ed. 1984 at p. 467 in *Utah County v. Orem City*, 699 P.2d 707 (Utah 1985), continued on,

> "If it is natural or reasonable to think that the understanding of the legislature or *of persons affected by the statute would be influenced by another statute,* then those statutes should be construed to be in pari materia, construed with reference to one another and harmonized if possible." **(underlining and italics added; footnotes omitted).**

In *Cazares v. Cosby*, 2003 UT 3, 65 P.3d 1184, the Utah Supreme Court referred to a citation from the 4th ed. 1973 "...for the proposition that legislatures know of statutes of related subject matter and have them in mind when enacting new statutes...." **(underlining added).**

These same canons of interpretation were voiced again in *T.R.F. v. Felan*, 760 P.2d 906, 909 (Ut. App. 1988):

> "It is presumed the Legislature intends to achieve a consistent body of law. 1A C. Sands, *Sutherland Statutory Construction* § 23.09, at 332 (4th ed. 1985). Thus, statutes relating to the same subject matter 'should be

construed with reference to each other and harmonized, if possible,' so that effect is given to *every provision* of the statutory scheme."

(citation omitted and underlining and italics added).

"[E]ach section of a law which deals with the same subject matter must be read in pari materia with other sections on the same subject." (p. 202; see Addendum, Exhibit "N")

"[C]ourts have held that application of the rule must be applied before any other rules of statutory construction."

(p. 235; underlining added; see Addendum, Exhibit "O")

"The rule that legislative provisions which are pari materia should be construed together applies also to rules of court."

(p. 185; underlining and italics added; see Addendum, Exhibit "P")

This is determinative to the illation that Small Claims Rule 12 must be read in pari materia with U.C.A. §78-6-14(4) and C.J.A. Rule 4-803(2)(D).

"For example, it has been held that Rules of Civil Procedure promulgated by a Supreme Court have the same force and effect as statutes passed by the legislature.[30]

[30]**Pennsylvania.** The statutory provision and the Rules of Civil Procedure relate to the same subject matter, partition of property, and therefore should be read in pari materia. Lohmiller v. Weidenbaugh, 503 Pa. 329, 469 A.2d 578 (1983)."

(p. 233; underlining and italics added; see Addendum, Exhibit "Q")

"To be in pari materia, statutes need not...refer to one another."

(p. 235; see Addendum, Exhibit "O")

So it'd certainly prove decisive if Small Claims Rule 12 were to say,

"The appropriate fee, as provided in U.C.A. §§78-6-14(4) and 78-7-35, must accompany the Notice of Appeal", or,

"Pursuant to C.J.A. Rule 4-803(2)(D), the appropriate fee must accompany the Notice of Appeal".

However, it may not be inferred *from a lack of such direct reference* that the conjoint statute and rules are not to be construed together.

An example of this rule made operative is to be found in *Utah County v. Orem City* further on at pp. 709 and 710:

"The...statutes mentioned...have as a common purpose the identification of those who may use county jails and who must bear the costs of that use. Thus, these statutes should be construed with reference to one another and harmonized if possible....[S]ection 17-22-9 (federal prisoners) and section 10-13-23 (town prisoners), neither of which is mentioned in section 17-22-8, require that the county be compensated for the expense of boarding those prisoners. Therefore, it is only reasonable that the cities also could be required to compensate the county for incarceration of city prisoners *even though such a requirement is not specifically mentioned* in section 17-22-8." **(underlining and italics added).**

O.K., SO HOW COME, AS ADVERSE COUNSEL CORRECTLY POINTS OUT, THE COURT IN *DIPOMA* HELD THAT R.Civ.P. 3(a), RELATING TO FILING A COMPLAINT, DOES *NOT* INCORPORATE U.C.A. §21-1-5 (now renumbered as 78-7-35), RELATING TO THE FILING FEE THEREFOR?

Well, to realize why, you have to understand two further wrinkles in the doctrine of *pari materia*. To wit:

"When the language of a state act [or rule] is adopted from

federal legislation [or procedural provisions], **courts will ordinarily construe the state statute** [or rule] **in accordance with the construction given the federal statute** [or rule]."

(p. 188; see Addendum, Exhibit "R")

And of utmost importance to comprehend the honorable Court's holding in *Dipoma*:

"But if words [or provisions] **used in a prior statute... <u>are omitted</u>, <u>it will be presumed that a change of meaning was intended</u>."**

(p. 199; see Addendum, Exhibit "S")

"...'where a statute [or rule], **with reference to one subject contains a given provision, <u>the omission of such provision from a similar statute</u>** [or rule] **concerning a related subject <u>is significant to show that a different intention existed</u>.'"**

(pp. 199-201; underlining added in both instances)

Two cases are footnoted at p. 188 of <u>Sutherland</u> to illustrate this point:

"[14]**United States.** ...The deliberate selection of language so differing from that used in earlier Acts indicates that a change of law was intended. Gutierres de Martinez v. Lamagno, 515 U.S. 417, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995).

...**Idaho.** The amendment recognizes that the main purpose of punitive damages (deterrence) is destroyed when the wrongdoer dies. The fact that a similar amendment was not made to the later statute is evidence that the legislature did not intend to allow living wrongdoers to escape the imposition of punitive damages. Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980) (overruled on other grounds by, Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986))."

WITH THE ABOVE FIRMLY IN MIND, ALL THAT REMAINS TO ATTAIN A CORRECT GRASP OF THE HONORABLE COURT'S HOLDING IN *DIPOMA v. McPHIE* IS TO CITE THEREFROM. To wit:

"¶ 11 This court has not addressed the issue [as presented in

Dipoma] of whether the payment of filing fees is a jurisdictional requirement for commencing an action at the trial level. However, this court has addressed whether filing fees are jurisdictional on appeal. In doing so, this court has consistently looked to the plain language of the applicable rule when construing it, thereby declining to read additional language into the rule. For example, in *Prowswood, Inc. v. Mountain Fuel Supply Co.*, 676 P.2d 952 (Utah 1984), this court addressed the question of whether payment of docketing fees is a jurisdictional requirement under rule 73 of the Utah Rules of Civil Procedure, which governed the filing of appeals prior to 1985. **[And quoting the honorable Court's holding in *State v. Johnson*, 700 P.2d 1125 at 1128 (Utah 1985), "We more recently reviewed this issue in *Prowswood*...and concluded that failure to pay the filing fee within the requisite period is a defect of jurisdictional magnitude."]** Rule 73 stated in pertinent part: 'A party may appeal from a judgment by filing with the district court a notice of appeal, together with sufficient copies thereof..., *and depositing therewith the fee required for docketing* the appeal in the Supreme Court.' *Id.* at 954-55 (quoting Utah R. Civ. P. 73(a)). In determining whether rule 73's docketing fee requirement was jurisdictional, the *Prowswood* court distinguished rule 73 from rule 3 of the Federal Rules of Appellate Procedure, which set forth only the requirement that an appellant must file a notice of appeal, and then stated: 'Failure of an appellant to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.' *Id.* at 958 (emphasis added) (quoting Fed.R.App. P. 3(a)). The *Prowswood* court concluded that the plain language of rule 73, unlike rule 3 of the Federal Rules of Appellate Procedure, expressly made both the notice of appeal *and* the docketing fee requirement jurisdictional. *See id.* at 959.

"¶ 12 However, on January 1, 1985, rule 73 was superseded by rule 3

of the Utah Rules of Appellate Procedure. Rule 3, like rule 3 of the Federal Rules of Appellate Procedure, contained no express reference to payment of the docketing fee at the time of filing as a jurisdictional requirement. Accordingly, because the language making payment of filing fees a jurisdictional requirement had been removed, this court, in *State v. Johnson*, held that '[u]nder Rule 3, the timely payment of fees on an appeal from the district court to this Court *is no longer jurisdictional.*' 700 P.2d 1125, 1129 n. 1 (Utah 1985) (emphasis added).

"¶ 13 ... *See Hausknect v. Indus. Comm'n*, 882 P.2d 683, 684-85 (Utah Ct.App.1994) (holding payment of required fees jurisdictional under Utah Rule Appellate Procedure 14, where rule stated that '[a]t time of filing any petition for review, the party obtaining the review *shall* pay to the clerk of the appellate court *such filing fees as are established by law*, and also the fee for docketing the appeal' (emphasis added) (quoting Utah R.App. P. 14(b))))." **(The language of *this* rule hasn't changed and it still obtains.)** (internal quotations omitted; underlining added in all instances above)

(quoting *Dipoma v. McPhie*, 2001 UT 61, 29 P.3d 1225 at 1228, 1229)

And the Court of Appeals gave this restatement of the foregoing in *Raiser v. Buirley*, a case adduced in the adverse party's brief to evince a pivotal point thereof:

"¶ 5 **Following** adoption of the **current** rule 3(a) of the Utah Rules of Appellate Procedure, the Utah Supreme Court ruled that timely payment of the filing fee for appeal is not jurisdictional. See State v. Johnson, 700 P.2d 1125, 1129 n. 1 (Utah 1985) (holding plain language of rule 3(a) establishes that 'the timely payment of fees on an appeal from the district court to this court is **no longer** jurisdictional')." (underlining and bolder type-

face added; quoting *Raiser v. Buirley*, 2002 UT App 277, 54 P.3d 650).

Although a very careful reading of the above is necessary to observe the contrast, in *Dipoma v. McPhie* the Court was addressing the issue of whether the filing fee was a jurisdictional requisite under **Civil Procedure** Rule 3(a), and in *State v. Johnson* it undertook whether the fee was jurisdictional per **Appellate Procedure** Rule 3(a). Insomuch as neither of these rules contained a plain language mandate of fees, the Court held in both cases that the only jurisdictional requirement was either the filing of a complaint in the first instance or a notice of appeal in the latter.

However, in *Gorostieta v. Parkinson,* 2000 UT 99, 17 P.3d 1110, the question at bar was **which section** of Appellate Procedure Rule 3 should govern? As the Court phrased the matter at ¶ 17 of its holding, "Parkinson relies on rule 3**(f)** of the Utah Rules of Appellate Procedure for her position. The Gorostietas counter that rule 3**(a)** is dispositive...." (contrasting bolder typeface added)

Thereafter, at ¶ 19 of *Gorostieta*, the Court offers an analysis as to which section controls, but it significantly concludes by harking back to the Court's determination of this rule in *State v. Johnson* --- namely that, in the permutation of the former R.*Civ.*P. 73 into the present R.*App.*P. 3, the omission of prior express language which made the filing fee jurisdictional must be taken as intending a change of meaning in the rule in that regard. And this is in keeping with the precepts of the doctrine of

pari materia.

But observe this variance very carefully: Whereas distinct omission of a prior provision from a succeeding embodiment of a statute/rule, or even from a similar, related statute/rule, must be taken to indicate a contrasting intended meaning of the legislature in such cases, this DOES NOT MEAN that if a provision appears in one related statute/rule, but is absent from another, then the statutes/rules cannot be read in pari materia to give effect to all provisions of each. Perhaps juxtaposing two differing principles relied upon by the Utah Court of Appeals in the 1995 case of *State in Interest of R.N.J.*, 908 P.2d 345 at pp. 348 and 349, will serve to enunciate this contrast:

> "[O]ur conclusion is consistent with the general principle 'that when two statutory provisions conflict, the more specific provision will prevail over the more general provision.' *Williams v. Public Ser'v. Comm'n,,* 754 P.2d 41, 48 (Utah 1988)."
>
> "Our conclusion is also supported by the principle that 'the later expression of the legislature' controls when statutes conflict or overlap in their treatment of the same subject matter....(quoting 2A C. Sands, *Sutherland Statutory Construction,* § 51.02 at 290 (4th ed. 1973)). " (internal quotations and citation omitted)

The preceding two prescripts are not specifying the same thing, and the former of them, which crucially bears upon the assertion that Small

Claims Rule 12 must be read in *pari materia* with U.C.A. §78-6-14(4) and C.J.A. Rule 4-803(2)(D), was given prior expression by the Utah Supreme Court in *State ex rel. Public Service Commission v. Southern Pac. Co.*, 95 Utah 84, 79 P.2d 25 (1938):

> "The rule, however, is that, where there is a general provision and a specific one, the specific must be given full effect. 11 Am.Jur. 663. This rule of statutory construction was upheld in Salt Lake City v. Salt Lake County, 60 Utah 423, 209 P. 207, wherein it was said (page 208): "Further, it is an elementary doctrine that, where two statutes treat of the same subject-matter, the one general and the other special in its provisions, the special provisions control the general. State ex rel. Morck v. White, 41 Utah 480, 126 P. 330; Nelden v. Clark, 20 Utah 382, 59 P. 524, 77 Am.St.Rep. 917; University of Utah v. Richards, 20 Utah 457, 59 P. 96, 77 Am.St.Rep. 928; Crane v. Reeder, 22 Mich. 322."

Desitively, a succinct summation of the foregoing argument can perhaps be found in this citation from *Murray City v. Hall*, 663 P.2d 1314, 1318 (Utah 1983):

> "In construing these two statutes, we rely on another well-established rule of statutory construction, which provides:
>
> > **'[I]t is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in these prior statutes, and they should all be construed together.**[...]
> >
> > **'Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable**

construction, both are to be so construed that effect is given to every provision in all of them.'

2A C. Sands, *Sutherland Statutory Construction* § 51.02, at 290 (4th ed. 1973). Sections **[being reviewed by the court]** are in *pari materia*....Thus, these statutes should be construed with reference to each other."

(internal quotation truncated; underlining added in all instances throughout)

SO IN CONCLUSION, as was previously expounded concerning this decretum of statutory construction, **"To be in pari materia, statutes need not...refer to one another."** Even at ¶ 10 of its holding in *Dipoma,* the Court was careful to observe this qualification: "Dipoma argues, in response, that rule 3 contains no language requiring filing fees, nor **expressly** incorporates sections 21-1-1, 21-1-5, or 21-7-2 of the Utah Code...." **(bolder typeface added). AND IT IS POSITED IN THE PRESENT MATTER THAT *PARI MATERIA* ALSO REQUIRES that Utah Small Claims Procedure Rule 12 MUST BE construed with U.C.A. §78-6-14(4) and C.J.A. Rule 4-803(2)(D) AND CANNOT be taken alone.**

REPLY ARGUMENT V.

Ignoring All Other Considerations, Appeal Filed *Coram Non Judice*

In the foregoing section of argument, much effort was expended to show that the case law as cited by adverse counsel, *viz.*, *Dipoma v. McPhie* and *Gorostieta v. Parkinson*, would not support the assertions of

his opposing brief at pp. 12 and 13-14 respectively that:

> "[T]he Utah Appellate Courts have recognized that failure to pay the proper amount of the filing fee does not divest a court of jurisdiction, but requires that the filing fee be paid correctly within a reasonable period of time."
>
> Or, "The Utah Appellate Courts have held that timely filing of a notice of appeal or complaint in the trial court is jurisdictional, however the proper payment of the filing fee is not required if the payment of the fee is paid within a reasonable time."

For it has been countered *inter alia,* that the essential factor in conflict with these declarations of adverse counsel was pointed out and made clear by his own remark on *Dipoma* at p. 14 of his opposing brief, "In sum, the Court noted that in the absence of language mandating that a fee be paid prior to creating jurisdiction, the filing should be permitted." (underscoring added to highlight a critical aspect).

HOWEVER, in citing the case of ***Raiser v. Buirley,*** **adverse counsel raises a different contention.** To wit: LET US SUPPOSE THAT PAYMENT OF THE FILING FEE WITHIN THE REQUISITE PERIOD WAS INDEED INDISPENSABLE FOR JURISDICTION. NEVERTHELESS, IF A TENDERED AMOUNT, ALBEIT DEFICIENT, WAS SO PAID TO THE COURT CLERK, DID THE CLERK NOT HAVE AN AFFIRMATIVE DUTY TO PROMPTLY CALL THIS TO THE PROFFEROR'S ATTENTION, IN ORDER THAT THE MISTAKE MIGHT HAVE BEEN SUFFICIENTLY REMEDIED?

Well, this reflection might prove very compelling apart from one most salient fact —— the Real Party in Interest filed her appeal *coram non judice* , which is to say, **IN THE WRONG COURT.**

Absolutely every statute or rule imposing the filing of a notice of appeal for trial *de novo* of a small claims action concomitantly specifies **where** it should be filed: "...must file a Notice of Appeal (Form K) *in the court issuing the judgment*..." (Small Claims Procedure Rule 12(b)); "...by filing a notice of appeal *in the original trial court*..." (U.C.A. §78-6-10(1)); "...by filing a notice of appeal *in the court issuing the judgment*..." (C.J.A. Rule 4-803(2)(A)). (underlining and italics added)

And if that happens to be a justice court rather than the small claims department of a district court (the only two possibilities), the following directs what is to happen next:

> "**C.J.A. Rule 4-803(2)(F) Procedures - Record of justice court.** Within ten days of the filing of the notice of appeal in a justice court, the court shall transmit to the district court the notice of appeal, *the district court fees*, a certified copy of the docket or register of actions, and the original of all pleadings, notices, motions, orders, judgment, and other papers filed in the case." (Italics and underlining added)

O.k., what it boils down to is this: If it's a justice court that first heard the case, you send them a notice of appeal and $80. The justice court then skims $10 off the top (its cut), and sends the notice of appeal, the

record (such as it is for a court of no record), and $70 up to the district court. The district court then dockets the case for trial *de novo.*

Now as to what took place (the *res gestae*) in the present matter, you fortuitously don't have to take my word for it; the account of the adverse counsel in his opposing brief, and the record, can be referred to. His rendition is perhaps self-contradictory, but here's what he says:

> (quoting opposing brief of adverse counsel at p. 6) "...paid the $70.00 filing fee...after a telephone call requesting confirmation of the amount due *with the Third District Court Clerk.*" (italics added)
>
> Contrasting at p. 7 with: "...spoke with a clerk *at the Justice Court* requesting the amount of the filing fee in the appeal of this matter." (italics added)
>
> But hell, these two statements ain't irreconcilable. Quite obviously---in a pig's behind rather!---clerks of both courts must have been contacted about the fee amount.

And here, inconsistent with one of the preceding statements (and two more that follow), we have Janet Layosa's affidavit:

> "7. ...I requested a check in the amount of $70.00 which was attached to the letter from Richard Barnes in his letter transmitting the Notice of Appeal *to the Justice Court.* (italics added)

Which conflicts with adverse counsel's brief at p. 6 under Statement of Facts:

> "3. Counsel's office was informed that the $70.00 filing fee *should*

be sent to the District Court. See id. [i.e., see affidavit of Janet Layosa]" (italics added)

"4. The $70.00 filing fee (required by Section 78-7-35) *was sent to the District Court*. See letter dated February 12, 2003 from Richard N. Barnes to the Clerk of the Court, at Record 41-42." (Italics added)

I believe that the above citation to the record is incorrect; the Notice of Appeal and Richard N. Barnes' cover letter attendant to it, both dated February 12th, 2003, are at pp. 39-40 thereof. But by all means, DO INDEED TAKE A LOOK AT THEM. I've even put copies of both in the Addendum (see Exhibits "A" and "B") to aid you in such an examination.

NOW HERE'S THE REAL STORY OF WHAT ACTUALLY HAPPENED (which, apart from adverse counsel's own above admissions, I also know from talking to the clerks of both the justice and district courts): *The Notice of Appeal and $70 and the docket of the justice court proceedings (and any filings therein)* should have come to the district court from the justice court. BUT CONTRARY TO THREE SEPARATE PROVISIONS---of a statute, a procedural rule, and a rule of court---adverse counsel mailed $70 and his notice of appeal directly to the district court. Now it was *an obvious tip-off from the case no. cited in the notice of appeal* that this was a justice court case. **SO** the district court clerk rang down to the justice court and said, "We've got everything we need here, except the docket of the proceedings from your tribunal and any pleadings filed therein.

Send those up to us." THEN the district court clerk merely docketed the case for trial de novo.

Only the district court clerk never inquired of the justice court as to whether a $10 check had been mailed to them separately or not. And the TRUE QUESTION AT ISSUE HERE is: Did the district court clerk have an affirmative duty to make such an inquiry? Well, if she did, it represents a far, far different matter than anything the appellate courts have addressed per the case law cited by adverse counsel.

****

JUST TWO MORE POINTS, and then I close:

1.) "Familiarity breeds contempt", or so the old maxim goes. Kevin Tanner, who wrote the opposing brief on behalf of adverse counsel, has no delusions about how sharp-eyed or nimble-witted appellate court law clerks are. He once did a stint himself with the Court of Appeals. So nobody knows better than he how easily they can be thrown off the scent by a little sly misdirection. And here's the proof of it:

The present case now proceeds at bar only because a petition for rehearing was granted. And in its aforetime order dismissing this action, the honorable Court voiced the following:

> "The petition for extraordinary relief is denied. **Petitioner has not demonstrated the notice of appeal of small claims judgment was filed in the wrong court, regardless of any technical errors in the caption**

of the notice, and has not demonstrated the payment of filing fees was jurisdictional." **(bolder typeface and underlining added)**

Those discrepant statements made by adverse counsel in his brief should prevent this hereafter, but how did he previously get the honorable Court to buy the idea that the Notice of Appeal was merely miscaptioned rather than filed in the wrong court? Well, if you'll hark back to my initial brief at p. 16, adverse counsel was able to capitalize upon and get mileage from Tooele Justice Court and Third District Court, Tooele Dept., both sharing the same address——47 S. Main Street, Tooele.

And while you're back there, note the point I made about adverse counsel's cagey use of ambiguity in always referring indistinctly to the "Tooele Court", as at p. 10 of his opposing brief. But it seems he can make it work though. And as one devious son of a bitch forced to concede the slick dexterity of another, I have to grudgingly admire his deft ability to hocus-pocus the honorable Court.

2.) Well, say anything often enough and it will come to be believed, I guess. At p. 10 of adverse counsel's brief, he recites with grieved plaintiveness: "It was not until after the expiration of the ten day appeal period that Petitioner brought the error to the attention of the parties through his Motion to Dismiss." Mother of God! Has the man no shame? Please attentively regard the refutation of this found at p. 11 of my initial brief, and the gainsaying document at p. 48 of the record.

Conclusion and Precise Relief Sought

From the foregoing facts and argument, presented to refute the contentions of adverse counsel's brief in opposition, it is evident and clear that (a.) it is highly suspect and totally unproven that any justice court clerk ever misguided or misinformed adverse counsel or his staff as to the amount of the filing fee due on appeal de novo of the small claims action, and only hearsay has been adduced to maintain this, (b.) even assuming *arguendo* that such misdirection was ever provided by a clerk, it was improperly sought and relied upon by adverse counsel or his staff, because a clerk cannot render legal advice, and it has been demonstrated that such it would be, (c.) the fee schedule charts provided on the Utah State Courts' website pertain only to sums due in district courts and not justice courts, and hence adverse counsel wrongly maintains that he was misled by them, and (d.) the case law, displayed by adverse counsel to assert that, in similar circumstances, the appellate courts have held that parties are not to be prejudiced by the missteps of court clerks, does not apply. Because the Real Party in Interest confused the situation by filing her Notice of Appeal in the wrong tribunal. Therefore the Court is prayed to hold for the Petitioner in this matter, and issue its writ of prohibition to the district court, directing that it cannot assume jurisdiction, and further directing it to enter an order of dismissal

of the cause of the Defendant/Real Party in Interest on appeal.

Respectfully submitted,

Clifton W. Panos

Clifton W. Panos pro se
Petitioner/Plaintiff

DATED this 12th day of January, 2004.

Certificate of Service

Service is constated upon the respective parties' counsels---to each of them two (2) true and correct replications of the foregoing document entitled REPLY BRIEF OF PETITIONER ON REHEARING---along with two (2) copies each of the separately bound Addendum thereto---via posting by the U.S. Mail, with first-class postage and all other fees prepaid, to their respective addresses as shown on the official U.S. Postal Service Certificates of Mailing, exhibited either at Appendix "T" of the Addendum or immediately hereafter, per the dates postmarked thereon.

Clifton W. Panos

Clifton W. Panos pro se
Petitioner/Plaintiff

mailing receipts apply to actual brief only. Addendum sent separately late

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PAUL H. MATTHEWS & ASSOCIATES, P.C.

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February 12, 2003

Third District Court
Tooele County,
Small Claims Department
47 South Main #141
Tooele, Utah 84074

RE: **Panos v. Castle**
Civil No. 02-31
Our File No. Allied-413

Dear Clerk of the Court:

Please file the enclosed original:

0383000028

1. **NOTICE OF APPEAL.**

Please also find enclosed our check in the amount of $70.00 for the appeal. Please return your receipt in the enclosed self-addressed stamped envelope.

Very truly yours,

PAUL H. MATTHEWS & ASSOCIATES, P.C.

Richard N. Barnes

RNB:jbl
Enclosures
Letter to Court 01.wpd